Supreme Court, U.S.
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No. 93-1477

In The

Supreme Court of the United States

October Term, 1993

MICHAEL O. TATUM,

Petitioner,

v.

PHILIP MORRIS INCORPORATED, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. Whether a plaintiff's Seventh Amendment right to a jury trial is violated when his legal and equitable claims are not tried together, but the trial court properly dismisses the legal claims on summary judgment because plaintiff has no basis in law or fact to support them?

2. Whether a plaintiff's Seventh Amendment right to a jury trial is violated when his legal and equitable claims are not tried together, but the trial court would have entered judgment as a matter of law in favor of defendants on all of plaintiff's claims had a jury trial on the legal and equitable claims been held?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

RESPONSE TO STATEMENT OF THE CASE 2

ARGUMENTS AND AUTHORITIES IN SUPPORT OF DENYING TATUM'S PETITION FOR CERTIORARI 6

PROPOSITION: THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT'S PROPER GRANT OF SUMMARY JUDGMENT ON TATUM'S PENDENT CLAIMS DID NOT DENY TATUM HIS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL 6

SUMMARY OF ARGUMENT 7

A. *The Proper Pretrial Disposition of Tatum's Pendent Claims Rendered the Jury Trial Issue Moot* 7

B. *Tatum Was Not Denied His Right to a Jury Trial on His Pendent Claims* 13

CONCLUSION 15

APPENDIX A1

TABLE OF CONTENTS – Continued

Page

ORDER AND JUDGMENT OF THE TENTH CIRCUIT COURT OF APPEALS A1

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA A13

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA A30

TABLE OF AUTHORITIES

Page

CASES

B & L Sales Assocs. v. H. Daroff & Sons, Inc., 421 F.2d 352 (2d Cir.), cert. denied, 398 U.S. 952 (1970) 8

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 12

Christensen v. Ward, 916 F.2d 1462 (10th Cir.), cert. denied, 498 U.S. 999 (1990), reh'g. denied, 498 U.S. 1075 (1991) 14

City of Chanute, Kansas v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), cert. denied, ___ U.S. ___ (1992) 14

Davis v. United States, 742 F.2d 171 (5th Cir. 1984) 14

DeBry v. Transamerica Corp., 601 F.2d 480 (10th Cir. 1979) 14

Fidelity & Deposit Co. v. United States ex rel. Smoot, 187 U.S. 315 (1902) 13

Galloway v. United States, 319 U.S. 372, reh'g denied, 320 U.S. 214 (1943) 13

Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987) 9

In Re N-500L Cases, 691 F.2d 15 (1st Cir. 1982) 8

King v. United Benefit Fire Ins. Co., 377 F.2d 728 (10th Cir.), cert. denied, 389 U.S. 857 (1967) 8, 13

King v. University of Minnesota, 774 F.2d 224 (8th Cir. 1985), cert. denied, 475 U.S. 1095 (1986) 10

TABLE OF AUTHORITIES – Continued

Page

Laskaris v. Thornburgh, 733 F.2d 260 (3d Cir.), cert. denied, 469 U.S. 886 (1984) 10

Lehman v. Nakshian, 453 U.S. 156 (1981)..... 7

Molthan v. Temple Univ., 778 F.2d 955 (3d Cir. 1985)..... 10

Plaisance v. Phelps, 845 F.2d 107 (5th Cir. 1988) .. 8, 9, 14

Sailor v. Hubbell, Inc., 4 F.3d 323 (4th Cir. 1993) ..9, 10

Snider v. Circle K Corp., 923 F.2d 1404 (10th Cir. 1991)..... 7

U.S. v. McMullin, 948 F.2d 1188 (10th Cir. 1991)..... 9

United States v. 243.22 Acres of Land, 129 F.2d 678 (2d Cir.), cert. denied, sub nom. Lambert v. United States, 317 U.S. 698 (1943)..... 8

STATUTES

42 U.S.C. § 1981..... 10

42 U.S.C. § 1983..... 10

42 U.S.C. § 1985..... 10

42 U.S.C. §§ 2000(e), et seq. ..... *passim*

MISCELLANEOUS

Rule 11, Federal Rules of Civil Procedure..... 5

Rule 39(a)(2), Federal Rules of Civil Procedure..... 8

Rule 56(c), Federal Rules of Civil Procedure..... 13

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MICHAEL O. TATUM,

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PHILIP MORRIS INCORPORATED, et al.,

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Philip Morris Incorporated, Philip Morris Management Corp. and Ralph Rayburn (collectively "Philip Morris" unless otherwise specified) respectfully request that this Court deny the Pro Se Petition for Writ of Certiorari (the "Petition") seeking review

of the Tenth Circuit Court of Appeals' December 14, 1993 Order and Judgment in this case.[1]

OPINIONS BELOW

The Tenth Circuit's December 14, 1993 Order and Judgment, the trial court's Findings of Fact and Conclusions of Law on Petitioner's Title VII claim, and the trial court's Order Granting Defendants' Motion for Summary Judgment are reprinted in Philip Morris' Appendix. The trial court's decisions are published as *Tatum v. Philip Morris Inc.*, 809 F.Supp. 1452 (W.D. Okla. 1992), *aff'd*, 16 F.3d 417 (10th Cir. 1993) *pet. for cert. filed* (March 14, 1994).

RESPONSE TO STATEMENT OF THE CASE

Petitioner (hereinafter "Tatum") has excluded from his "Statement of the Case" certain facts relied upon by the trial court and the Tenth Circuit in deciding this case in favor of Philip Morris. Tatum's "Statement of the Case" consists mostly of a jaundiced view of the procedural history of the case and of "facts" which the trial court and Tenth Circuit found to be immaterial. A more cogent

[1] In accordance with Supreme Court Rule 29.1, Respondents Philip Morris Incorporated and Philip Morris Management Corp. are wholly-owned subsidiaries of Philip Morris Companies Inc. All companies affiliated with Philip Morris Incorporated and Philip Morris Management Corp. are wholly-owned by Philip Morris Companies Inc.

recitation of the facts may aid the Court in determining that Tatum's Petition should be denied.

Tatum's primary claim in this lawsuit is that his employment was terminated because he is male. Tatum, a white male, was employed by Philip Morris as a sales representative in the Oklahoma City, Oklahoma area from April, 1985 until March 7, 1990. From May, 1987, until his termination from employment Tatum was supervised by Ralph Rayburn. (A. 14, 33.)

On February 23, 1990, Tatum attended a reception sponsored by Philip Morris at a country club in Oklahoma City. Tatum asked Mr. Rayburn if he could take a decorative bottle of wine located at the entrance to the reception. Mr. Rayburn informed plaintiff that he could not because it belonged to the country club. Tatum subsequently asked another supervisor whether he could have the bottle of wine, and was again informed that he could not. Later that evening, three individuals observed Tatum taking the bottle of wine, while a fourth observed Tatum with the bottle of wine in his possession. (A. 14-15, 33-34.)

Mr. Rayburn was later told about the theft. He informed his supervisor and an investigation was conducted. Philip Morris determined that Tatum's conduct violated company policy and constituted a terminable offense. The appropriate approvals for termination were obtained from Philip Morris' regional and national offices, and Tatum's employment was terminated on March 7, 1990. Tatum's employment was terminated only because he violated company policies against dishonesty and insubordination. (A. 15, 34.)

Tatum then sued on six causes of action, alleging: (i) Philip Morris committed "reverse" discrimination by terminating his employment based on his gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), et seq. ("Title VII"); (ii) Philip Morris violated Oklahoma's public policy by terminating Tatum's employment in violation of Title VII; (iii) Philip Morris tortiously interfered with contractual relations Tatum had with prospective employers, tortiously interfered with Tatum's prospective employment, and tortiously interfered with Tatum's economic relations; (iv) Philip Morris defamed Tatum; (v) Philip Morris intentionally inflicted emotional distress on Tatum; and (vi) Philip Morris negligently retained Mr. Rayburn. (A. 13-14, 33.)

Philip Morris moved for summary judgment on all of Tatum's claims. The trial court determined that it would hear the evidence on Tatum's Title VII claim in a bench trial[2] and would later try Tatum's pendent claims to a jury. At the conclusion of the Title VII trial held November 9 and 10, 1992, the trial court subsequently granted summary judgment to Philip Morris on Tatum's pendent claims, eliminating the need for a jury trial on those causes of action. (A. 2.)

In its Findings of Fact and Conclusions of Law addressing Tatum's Title VII claim, the trial court found that Tatum failed to establish a prima facie case of discrimination, Tatum's employment was terminated only because of his

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[2] This case was filed before the 1991 amendments to the Civil Rights Act and there is no contention those amendments, including the provision permitting jury trials, are applicable in this case.

dishonesty and insubordination, there was no evidence presented that there were any other reasons for Tatum's termination from employment, no credible evidence was presented that Tatum's employment was terminated because he is male, Philip Morris established by clear and convincing evidence that Tatum stole the bottle of wine, and Tatum's evidence was so weak that the Title VII claim should never have been filed. (A. 20, 23-29.)

In the Order Granting Defendants' Motion for Summary Judgment, the trial court found that Philip Morris was entitled to summary judgment on the pendent claims because Tatum failed to produce evidence sufficient to raise a genuine issue of material fact as to any of his pendent claims, and that the evidence Tatum did present was so weak that a reasonable jury could not possibly have found that he was entitled to prevail on those claims. The trial court found that Tatum should never have filed his pendent claims because there was no basis in law or fact for them. The trial court specifically disclaimed any reliance on the matters presented at the Title VII trial in making its ruling on Philip Morris' motion for summary judgment, and made clear that its ruling dismissing Tatum's pendent claims was made solely on the summary judgment record before it.[3] (A. 31, 37, 41-42, 45, 47, 52, 54-55.)

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[3] Philip Morris applied for its attorneys' fees as the prevailing party on the Title VII claim and for sanctions against Tatum and his counsel for pursuing frivolous claims. The United States Magistrate Judge who heard the applications for fees and sanctions recommended that Philip Morris be awarded its fees incurred in defending against the Title VII claim and that Tatum's counsel be sanctioned under Rule 11 by means of the circulation of a letter to the judges sitting in the Western District of Oklahoma stating that he had pursued frivolous claims. The

On appeal, the Tenth Circuit affirmed the trial court and held that even if procedural irregularities had resulted from the trial court's conducting a bench trial on Tatum's Title VII claim and then dismissing Tatum's pendent claims on summary judgment, the issue of a jury trial was rendered moot because the trial court properly disposed of the pendent claims on summary judgment. (A. 3, 12.)

ARGUMENTS AND AUTHORITIES IN SUPPORT OF DENYING TATUM'S PETITION FOR CERTIORARI

PROPOSITION: THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT'S PROPER GRANT OF SUMMARY JUDGMENT ON TATUM'S PENDENT CLAIMS DID NOT DENY TATUM HIS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

There are no special and important reasons for granting Tatum's Petition. There is no conflict among the United States courts of appeal regarding the matters at issue, nor has the Tenth Circuit departed from the usual course of judicial proceedings or sanctioned such a departure by the trial court. The decision by the Tenth Circuit does not conflict with decisions of this Court or

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trial court stayed entry of the Magistrate's Report and Recommendation pending the outcome of Tatum's appeal to the Tenth Circuit, and is now considering the Magistrate's Report and Recommendation.

address an important question of federal law not previously settled. No issue presented warrants review.

SUMMARY OF ARGUMENT

Tatum contends that the trial court denied his Seventh Amendment rights by not conducting a single jury trial of Tatum's pendent claims and his Title VII claim for equitable relief. Because summary judgment on the pendent claims was proper, Tatum was not denied his right to a jury trial. Under the then-applicable law, and in the absence of legal claims to submit to a jury, Tatum had no right to a jury trial of his Title VII claim. At most, the trial court's conducting a bench trial on the Title VII claim prior to ruling on the motion for summary judgment on the pendent claims was harmless error. Philip Morris would have been entitled to judgment as a matter of law on the pendent claims at the close of Tatum's evidence even had Tatum's Title VII claim and pendent claims been tried together to a jury.

A. The Proper Pretrial Disposition of Tatum's Pendent Claims Rendered the Jury Trial Issue Moot.

Prior to the applicability of the 1991 amendments, Title VII claimants were not entitled to a jury trial because the statute offered exclusively equitable remedies. *Snider v. Circle K Corp.*, 923 F.2d 1404, 1407 (10th Cir. 1991); *see also Lehman v. Nakshian*, 453 U.S. 156, 164 (1981) (recognizing in dicta that, under then extant law, there was no right to a jury trial in Title VII actions). A trial court may hear a case itself when it finds that none of the issues

presented in an action require a jury trial. Therefore, at the time this matter was tried, the trial court did not need to submit the case to a jury if the only issue appropriate for trial were a Title VII claim. *See* Fed. R. Civ. P. 39(a)(2).

The mere timing of the trial court's conducting of a bench trial on Tatum's Title VII claim and subsequent correct ruling on Philip Morris' motion for summary judgment on Tatum's pendent claims did not affect Tatum's substantive rights, and thus was not prejudicial. The Tenth Circuit properly found:

> Regardless of the Title VII determination, if the district court correctly granted summary judgment on the pendent state law claims, the procedural handling of the case could not have had any impact on plaintiff's right to a jury trial. In short, the proper pretrial disposition of plaintiff's legal claims rendered the jury trial issue moot. *See Plaisance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988); *B & L Sales Assocs. v. H. Daroff & Sons, Inc.*, 421 F.2d 352, 354 (2d Cir.), *cert. denied*, 398 U.S. 952 (1970). (A. 3.)

Regardless of the type of case, any arguably erroneous denial of a jury trial is harmless error not justifying retrial if, as here, there were only questions of law to be resolved or if a jury verdict in favor of the appellant would have to be set aside because of the lack of disputed facts. *King v. United Benefit Fire Ins. Co.*, 377 F.2d 728, 731 (10th Cir.), *cert. denied*, 389 U.S. 857 (1967); *In Re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982). That is because "there is no constitutional right to have twelve [people] sit idle and functionless in a jury-box." *United States v. 243.22 Acres of Land*, 129 F.2d 678, 684 (2d Cir.), *cert. denied, sub nom. Lambert v. United States*, 317 U.S. 698

(1943). The function of a jury is to try the material facts, and where no such facts are in dispute, there is no occasion for a jury trial. *Plaisance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988).[4]

This rule is equally applicable in employment discrimination cases, and there is no conflict among the circuit courts of appeal on this issue. Circuit courts of appeal in addition to the Tenth Circuit have consistently held that the denial of the right to a jury trial is harmless error where, as here, a judgment as a matter of law on plaintiff's claims would have been appropriate. In *Sailor v. Hubbell, Inc.*, 4 F.3d 323, 326-27 (4th Cir. 1993) the court held that the denial of a jury trial to plaintiff in a case filed under the Age Discrimination in Employment Act did not violate plaintiff's Seventh Amendment rights and was harmless error where no reasonable jury could have rendered a verdict for plaintiff and the trial court would have properly granted judgment as a matter of law in defendant's favor had a jury trial been held.[5]

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[4] *See also U.S. v. McMullin*, 948 F.2d 1188, 1192 (10th Cir. 1991) (denial of taxpayer's request for a jury trial harmless error where the court directed a verdict for the government and would have done so even had there been a jury); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1566 (11th Cir. 1987) (order denying plaintiff's demand for a jury trial in a civil action is harmless error if the evidence presented at trial is insufficient to withstand a motion for a directed verdict).

[5] The court of appeals in *Sailor* also correctly found that it was irrelevant that the trial court did not grant defendant's motion for involuntary dismissal during the bench trial. Like the trial court here, the trial court in *Sailor* allowed both sides to make full evidentiary presentations during the bench trial, and declined to rule on defendant's motion for involuntary

Similarly, in *Molthan v. Temple Univ.*, 778 F.2d 955, 961 (3d Cir. 1985) the court held that it was harmless error to deny a sex discrimination claimant's right to submit claims under Title VII and 42 U.S.C. § 1983 to a jury because a directed verdict against plaintiff would have been appropriate. Likewise, in *King v. University of Minnesota*, 774 F.2d 224, 229 (8th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986) the court held that the trial court could have entered a directed verdict against plaintiff on his claims under 42 U.S.C. §§ 1981 and 1983, and the failure of the trial court to grant plaintiff a jury trial was, at most, harmless error. Finally, in *Laskaris v. Thornburgh*, 733 F.2d 260, 264-65 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984) the court of appeals determined that where plaintiffs presented insufficient evidence to overcome defendant's motion for directed verdict, it was harmless error to deny plaintiffs a jury trial of their claims under 42 U.S.C. §§ 1983 and 1985.

Here, the trial court correctly granted summary judgment on Tatum's pendent claims and found that Tatum presented no evidence to support his Title VII claim, which judgments were affirmed on appeal. (A. 3, 12.) Since Tatum submitted no evidence in support of any of his claims, judgment as a matter of law for Philip Morris would have been appropriate at the close of Tatum's evidence even had Tatum received a jury trial on his

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dismissal. The court of appeals opined that the trial court's refusal to rule on defendant's motion did not imply that it would have denied a motion for a judgment as a matter of law in a jury trial. *Sailor*, 4 F.3d at 327, n. 6.

claims, and therefore Tatum was not denied his right to a jury trial.

In his Petition, Tatum totally ignores the Tenth Circuit's ruling that so long as the trial court correctly granted summary judgment on the pendent claims, the procedural handling of the case could not have impacted Tatum's right to a jury trial. Instead, Tatum focuses on dicta in the Tenth Circuit's ruling discussing that it was at least arguably proper for the trial court to have set the Title VII claim for hearing first given that its disposition could obviate consideration of the pendent claims should the trial court thereafter find the continued exercise of pendent jurisdiction unwarranted. (Petition, pp. 12-13.)

Tatum contends that this "ruling" by the Tenth Circuit creates an exception to the Seventh Amendment not previously recognized by this Court, the Tenth Circuit, or other courts of appeal. But the appellate court clearly did not hold in the manner attributed to it by Tatum. The Tenth Circuit specifically stated that it *need not decide* whether the rule generally requiring that legal and overlapping equitable claims be tried together to a jury, developed in cases where the legal claims possessed independent federal jurisdictional bases, should be suspended where, as here, the legal claims are cognizable in federal court only through pendent jurisdiction. (A. 3.) Instead, the Tenth Circuit thoroughly analyzed the trial court's ruling on Philip Morris' motion for summary judgment, affirmed the ruling, and found that Tatum's right to a jury trial was not violated because his pendent claims were correctly dismissed. (A. 3-11.) The Tenth Circuit's observation about dismissing the pendent

claims on jurisdictional grounds is dicta and is not the basis for its decision.[6]

Not only does Tatum fail to address the Tenth Circuit's real basis for its decision, but none of the authorities cited by Tatum to support the alleged denial of his Seventh Amendment right are apposite. In particular, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and its progeny do not apply. *Beacon Theatres* holds only that where there are common issues of fact in a case presenting *both* legal and equitable claims, the common issues of fact must first be submitted to a jury and the district court will be bound by the jury's findings on these facts. *Beacon Theatres*, 359 U.S. at 510-511. *Beacon Theatres* and its progeny are premised on the fact that the trial court *erroneously* dismissed plaintiff's legal claims, a situation not present here because the trial court correctly dismissed Tatum's unsupportable legal claims.

Tatum secondarily argues that the trial court erred by trying his Title VII claim separately from his tort claim for Philip Morris' alleged violation of Oklahoma's public policy because his public policy claim allegedly "parallels" his Title VII claim.[7] (Petition, p. 19.) Tatum once

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[6] Interestingly, Tatum argued in his briefs filed below that if the trial court did not err in deciding the Title VII claim first, the pendent claims should be dismissed for lack of jurisdiction. Yet Tatum now says that it was error for the Tenth Circuit to have allegedly based its ruling on the trial court's ability to dismiss for lack of jurisdiction.

[7] Tatum, however, did not even present the same "evidence" at trial in support of his Title VII claim that he presented in support of his public policy claim in opposing Philip Morris' motion for summary judgment.

again ignores the Tenth Circuit's ruling that summary judgment was properly granted on the public policy claim because he had no evidence to support it (A. 6-8), and therefore Tatum's right to a jury trial could not have been violated.

In this case there were no "common issues of fact" to submit to a jury because Tatum's pendent claims failed to raise any issue of material fact and were properly dismissed. Without a triable claim for legal relief to submit to a jury, Tatum had no right to have his Title VII claim submitted to a jury. Even if his claims had been tried to a jury, Philip Morris would have been entitled to judgment as a matter of law, so any alleged denial of Tatum's right to a jury trial was harmless.

B. Tatum Was Not Denied His Right to a Jury Trial on His Pendent Claims.

Although it is not completely clear from his Petition whether Tatum contends that the award of summary judgment itself violated his right to a jury trial, if he takes such a position, it is meritless.

It is indisputable that the granting of a motion for summary judgment or directed verdict (now a judgment as a matter of law) in an appropriate case does not infringe upon the right to trial by jury. *Galloway v. United States*, 319 U.S. 372, 389-96, *reh'g denied*, 320 U.S. 214 (1943); *Fidelity & Deposit Co. v. United States ex rel. Smoot*, 187 U.S. 315, 319-21 (1902); *King*, 377 F.2d at 731. Rule 56(c) of the Federal Rules of Civil Procedure requires a court to render summary judgment if the appropriate materials on file show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law. Where no material facts are in dispute, there is no occasion for a jury trial. *Plaisance*, 845 F.2d at 108; *Davis v. United States*, 742 F.2d 171, 173 (5th Cir. 1984) (awarding double costs to the appellee on the grounds that the appeal on the issue of entitlement to a jury trial was frivolous).

The Constitution only requires that *bona fide fact questions* be submitted to a jury, and when a plaintiff fails as a matter of law to present an issue for trial and summary judgment is granted, his Seventh Amendment rights are not violated. *City of Chanute, Kansas v. Williams Natural Gas Co.*, 955 F.2d 641, 657 (10th Cir.), *cert. denied*, ___ U.S. ___ (1992); *Christensen v. Ward*, 916 F.2d 1462, 1466 (10th Cir.), *cert. denied*, 498 U.S. 999 (1990), *reh'g. denied*, 498 U.S. 1075 (1991); *DeBry v. Transamerica Corp.*, 601 F.2d 480, 490 (10th Cir. 1979).

Tatum's Title VII claim was tried on November 9 and 10, 1992. At the end of that trial, the trial court advised the parties that judgment would be entered against Tatum because there was no evidence to support his Title VII claim. At that same time, the trial court informed the parties that it would likely grant Philip Morris' motion for summary judgment on the pendent claims. Contrary to Tatum's unsupportable contention that the trial court somehow relied on matters arising during the bench trial in ruling on Philip Morris' motion for summary judgment, in its Order Granting Defendants' Motion for Summary Judgment, the trial court made clear that in ruling on the motion, it did not rely "in any way on the evidence presented in the non-jury trial." Its grant of summary judgment was "based solely on the evidence presented by

the motion, briefs and exhibits presented by the parties to the motion." (A. 31.) Had the trial court not awarded summary judgment, Tatum would have received a jury trial.

Because the trial court did not rely in any way on the evidence presented at the non-jury trial in ruling on the motion for summary judgment, the fact that the non-jury trial occurred before the court granted summary judgment was, at most, harmless error. It is indisputable that the trial court's grant of summary judgment did not violate Tatum's right to a jury trial on his pendent claims.

CONCLUSION

For the reasons set forth above, the Court should deny Tatum's Petition for Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL O. TATUM, Plaintiff-Appellant, v. PHILIP MORRIS INCORPORATED, doing business as Philip Morris USA, a foreign corporation; PHILIP MORRIS MANAGEMENT CORPORATION, a foreign corporation; RALPH RAYBURN, sued in both his individual and representative capacities, Defendants-Appellees.	)	No. 93-6018 (D.C. No. CIV-90-1485-B) (W.D. Okla.)

ORDER AND JUDGMENT*

(Filed DEC 14 1993)

Before ANDERSON and EBEL, Circuit Judges, and WINDER,** District Judge.

**Honorable David K. Winder, Chief Judge, United States District Court for the District of Utah, sitting by designation.

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* This order and judgment has not precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff appeals from an adverse judgment entered by the district court in this combination Title VII/state tort action. Plaintiff was discharged from his employment with defendant Philip Morris Inc. (PMI) for allegedly stealing a bottle of wine at a company reception. PMI subsequently selected a female to fill the position vacated by plaintiff. Alleging that the wine incident was merely a false pretext to replace him with an attractive (though less qualified) woman, plaintiff brought suit for sex discrimination under Title VII. In addition, plaintiff asserted several pendent state law claims, including wrongful discharge in violation of public policy, tortious interference with contract, employment and economic relations, defamation, intentional infliction of emotional distress, respondeat superior, and negligent retention, all for which he timely demanded a jury trial.

The district court bifurcated the action and, over plaintiff's objection, tried the Title VII claim first. At the conclusion of the bench trial, the district court held that plaintiff had failed to carry his burden of showing discrimination. Shortly thereafter, the district court granted defendants' pending motion for summary judgment on the remaining claims. On appeal, plaintiff argues: (1) the procedure employed by the district court deprived him of

his right to a jury trial on the state tort claims; (2) contested issues of fact should have precluded summary judgment on those claims; (3) he was denied proper discovery; and (4) the district judge should have recused himself for bias. We affirm the judgment of the district court for the reasons to follow.

We need not pause long over the first issue raised by plaintiff. Regardless of the Title VII determination, if the district court correctly granted summary judgment on the pendent state law claims, the procedural handling of the case could not have had any impact on plaintiff's right to a jury trial. In short, the proper pretrial disposition of plaintiff's legal claims rendered the jury trial issue moot. *See Plaisance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988); *B & L Sales Assocs. v. H. Daroff & Sons, Inc.*, 421 F.2d 352, 354 (2d Cir.), *cert. denied*, 398 U.S. 952 (1970). Consequently, while we recognize that such claims generally must be tried to a jury before overlapping equitable claims are tried to the bench, *see Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988), we need not decide whether this rule, developed in cases where the legal claims possessed independent federal jurisdictional bases, should be suspended where, as here, the legal claims are cognizable in federal court only through pendent jurisdiction. In the former context, the legal claims would still have to be decided on the merits whatever the resolution of the equitable claim, while in the latter context, pendent jurisdiction over the legal claims could always be declined if the equitable claim proved unsuccessful. Thus, it was at least arguably proper for the district court to set the equitable claim for hearing first, given that its disposition could obviate consideration of

the legal claims should the district court thereafter find the continued exercise of pendent jurisdiction unwarranted.[1]

We turn now to the claims disposed of on summary judgment. This court recently summarized our standard of review for summary judgment on state law issues as follows:

> We review summary judgment de novo and apply the same legal standard used by the district court under Fed. R. Civ. P. 56(c). Summary judgment is appropriate if there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law. We view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. [Oklahoma] law governs [the state law claims], and in the absence of state cases on point we will look to other state courts as well as federal decisions. We review de novo the district court's application of [Oklahoma] law.

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[1] Indeed, plaintiff argues at one point that if the district court did not err in deciding the Title VII claim first, the remaining claims should have been dismissed without prejudice for lack of jurisdiction. *See* Reply Brief of Appellant at 5-6. We note, however, that such a ruling is discretionary, and, given the relatively late stage in the proceedings at which the Title VII claim was resolved, we cannot say the district court abused its descretion in retaining jurisdiction over the remaining, interrelated state law claims. *See Thatcher Enters. v. Cache County Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990).

Green Constr. Co. v. Kansas Power & Light Co., 1 F.3d 1005, 1008 (10th Cir. 1993) (citations and internal quotations omitted). We note that in keeping with the particular procedural circumstances surrounding its Rule 56 determination, the district court expressly discounted any reliance on the prior bench proceedings, noting that its "grant of summary judgment is based solely on the evidence presented by the motion, briefs and exhibits presented by the parties to the motion." App. Vol. I at 98.

Although plaintiff generally objects to the grant of summary judgment on all of his state tort claims, his appellate briefs contain no argument relating specifically to his claims for intentional infliction of emotional distress and respondeat superior. Accordingly, we do not address the propriety of summary judgment with respect to those claims. *See Culver v. Town of Torrington*, 930 F.2d 1456, 1461 (10th Cir. 1991) (issue not argued in appellate brief is waived). Furthermore, as to the negligent retention claim, plaintiff's complaint that defendants "did not address this issue except in a last minute footnote of their brief without citation to authority or to fact," Opening Brief of Appellant at 39, is not an objection to the substance of the district court's ruling thereon, and his perfunctory, unsupported conclusion that summary judgment "should have been denied," *id.*, is not adequate appellate argument, *see Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024-25 (10th Cir.) (to challenge summary judgment, nonmovant must identify sufficient contrary evidence in record; absent such specific reference, we will not search the record to determine whether there exists evidence which might require submission of case to jury), *cert. denied*, 113 S. Ct. 635 (1992); *see also*

United States v. Zannino, 895 F.2d 1, 17 (1st Cir.) (applying "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"), *cert. denied*, 494 U.S. 1082 (1990).

We begin our substantive review of summary judgment, then, with plaintiff's claim for wrongful discharge in violation of the public policy against invidious discrimination. *See generally Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218 (Okla. 1992); *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989). As plaintiff acknowledges, *see* Reply Brief of Appellant at 4, this "public policy tort" essentially parallels or incorporates plaintiff's sex discrimination claim under Title VII. *See Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 248 (10th Cir. 1993) ("Oklahoma recognizes a separate public policy tort claim for plaintiffs alleging facts sufficient to state a claim that they were wrongfully discharged in violation of, *inter alia*, Title VII"). The district court rejected the claim because:

> while Plaintiff states that he did not take the bottle of wine, he has provided no evidence that representatives of Philip Morris did not believe that he stole the bottle of wine at the time he was terminated and has produced no evidence that his termination was for any acts other than his acts of theft and insubordination.
>
> Defendants, on the other hand, have produced specific evidence which Plaintiff failed to dispute that his employment was terminated only because of his dishonestly for stealing the bottle of wine and for insubordination. . . .
>
> . . . .

> The court finds that there is no genuine issue as to any material fact that precludes Defendants from obtaining summary judgment on Plaintiff's claim that Defendants violated the public policy of Oklahoma. The court finds that the undisputed evidence presented to the court establishes that . . . gender played no part in the decision to terminate [plaintiff's] employment [and] . . . that Defendants believed Plaintiff stole the bottle of wine and terminated his employment based only upon that belief.

App. Vol. I at 106-08. Recast in the traditional terminology of employment discrimination jurisprudence, the district court's holding was that plaintiff had failed to rebut, as mere pretext for sex discrimination, the legitimate reason given for his discharge.[2]

Defendants presented substantial evidence that plaintiff was fired for dishonesty and insubordination based on his alleged theft of the bottle of wine after he specifically was told by his superiors not to take it. Defendants relied on several eyewitness accounts of the

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[2] It is appropriate to use the burden-shifting formulation established for assessment of federal employment discrimination actions in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to analyze plaintiff's public policy tort claim. *See, e.g., Erickson v. Marsh & McLennan Co.*, 545 A.2d 812, 815 & n.1 (N.J. Super. 1988), *aff'd in pertinent part, rev'd in part on other grounds*, 569 A.2d 793, 798-99 (N.J. 1990); *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 571-72 (Minn. 1987); *cf. Buckner v. General Motors Corp.*, 760 P.2d 803, 806-07 (Okla. 1988) (claim under retaliatory discharge provision of state workers' compensation act analyzed under federal formulation).

incident in arriving at their decision to terminate plaintiff. On appeal, plaintiff argues that the accuracy of these accounts is disputed by his own testimony and that of two of his witnesses. However, the materials cited by plaintiff indicate that the latter witnesses never came forward during his investigation and termination by defendants. At that time, defendants were confronted with concerted eyewitness accusations of plaintiff's theft – bolstered by his earlier expressions of interest in the object stolen – that were countered only by plaintiff's self-serving denial of wrongdoing. Under the circumstances, plaintiff's termination simply does not raise a triable inference of discrimination. Even if plaintiff's witnesses were correct, the only conclusion permitted on our record is that defendants reasonably (if erroneously) determined plaintiff was guilty of dishonesty and insubordination and fired him accordingly. The exercise of such business judgment does not provide a basis for a finding of pretext and, thus, discrimination.[3] *Cf. Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 747 (10th Cir. 1991); *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988). Furthermore, we concur in the district court's negative assessment of the evidence through which plaintiff sought to prove discriminatory intent more directly. *See, inter alia,* App. Vol I at 104-09.

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[3] We note plaintiff does not argue that other PMI employees, particularly women, were retained despite comparable transgressions, so this case does not involve the complication of disparity in discipline discussed in *EEOC v. Flasher Co.*, 986 F.2d 1312, 1319-22 (10th Cir. 1992).

Plaintiff's claim for interference with contract, employment, and economic relations is based on defendants' communication of his termination, and the reasons therefor, to PMI's customers, particularly those whom plaintiff characterizes as potential employers. While the district court rejected this claim for a number of reasons, we need only note our agreement with its holding that plaintiff failed to establish any protected interest or relationship with which defendants interfered.

The first element of a cause of action for tortious interference is the existence of a contractual or business relationship, *see Ellison v. An-Son Corp.*, 751 P.2d 1102, 1106 (Okla. Ct. App. 1987); *cf. Haynes v. South Community Hosp. Management, Inc.*, 793 P.2d 303, 306-07 (Okla. Ct. App. 1990); *Del State Bank v. Salmon*, 548 P.2d 1024, 1025-28 (Okla. 1976), and plaintiff simply has not shown one. While Oklahoma also recognizes a related theory of interference with *prospective* economic advantage, *see Overbeck v. Quaker Life Ins. Co.*, 757 P.2d 846, 847-48 (Okla. Ct. App. 1984) (whereas interference with contract involves loss of existing property right, interference with prospective economic advantage involves loss of reasonable expectation of profit), such a claim requires the plaintiff to "show either that prospective economic advantage *would have been achieved* had it not been for such interference or that there was, in view of all the circumstances, a *reasonable assurance thereof*," *Crystal Gas Co. v. Oklahoma Natural Gas Co.*, 529 P.2d 987, 990 (Okla. 1974) (quoting 45 Am. Jur. 2d, Interference § 6 (1984)) (emphasis added). As in *Crystal Gas*, there is insufficient evidence cited to support an inference that plaintiff

would have achieved profitable economic relations, i.e., obtained employment, but for defendants' conduct.

That leaves plaintiff's state law claim for defamation, based on defendants' publication of the reason for his discharge. The district court rejected this claim for several reasons. Again, we need consider only one of these.

We agree with the district court's determination that defendants had a conditional privilege under Oklahoma law to inform interested parties, including customers and employees, of the fact and circumstances of plaintiff's termination. *See M. F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167, 170-71 (10th Cir. 1968). *See generally Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 52 (Okla. 1962) (discussing common law conditional privilege doctrine), *cert. denied*, 376 U.S. 513 (1964). With that legal determination, whatever malice may have been presumed in law from defendants' accusation of theft was negated, leaving it plaintiff's burden to show such actual malice on the part of defendants as would defeat the privilege. *See Reininger v. Prickett*, 137 P.2d 595, 598 (Okla. 1943); *Meistrell v. McPhail*, 788 P.2d 1387, 1388 (Okla. Ct. App. 1989). The district court held plaintiff had not demonstrated a triable issue in this regard. *See Meistrell*, 788 P.2d at 512 (affirming summary judgment where plaintiff did not point to any evidence of malice); *cf. Reininger*, 137 P.2d at 598 (affirming directed verdict for defendant because of lack of evidence sufficient to establish prima facie case of malice). Plaintiff, whose only mention of the matter on appeal consists of a citation to *Wadley* for the general proposition that malice is a factual issue for the jury, does not point to anything in the record to challenge the district court's holding that the facts did not warrant

submission to the jury. We can only conclude the issue was properly resolved in defendants' favor. *See Thomas*, 968 F.2d at 1024-25.

Turning now to other matters, Plaintiff objects to the denial of his request for a continuance to conduct immediate discovery regarding a belatedly produced advertisement for his position run by an agency retained by PMI. Specifically, plaintiff wished to halt the proceedings until he deposed someone from the agency who could relate the qualifications and characteristics, if any, PMI wanted included in the ad. Given the procedural circumstances, the untaken opportunity to pursue pertinent discovery in a timely manner,[4] and the facially unprobative nature of the advertisement itself, we cannot say the district court abused its discretion in denying plaintiff's request for eleventh-hour discovery. *See generally Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1514 (10th Cir. 1990).

Finally, plaintiff raises the spectre of judicial bias, based on certain adverse rulings and the district judge's informal expression of skepticism regarding the persuasiveness of plaintiff's reverse sex discrimination case. Neither of these is a sufficient basis to compel the recusal

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[4] Defendants point out that long before this case came on for disposition, plaintiff's counsel was given documents indicating PMI had sought applicants for plaintiff's position from the agency that ran the ad. *See* App. Vol. III at 385-86. Thus, counsel has had at least five months, from the reopening of discovery in June of 1992 until November of 1992, to question the agency's personnel regarding pertinent instructions PMI may have related concerning the substitute sought for plaintiff.

of a trial judge. *See Green v. Dorrel*, 969 F.2d 915, 919 (10th Cir. 1992) (adverse rulings do not provide adequate grounds for disqualification), *cert. denied*, 113 S. Ct. 1336 (1993); *United States v. Page*, 828 F.2d 1476, 1481 (10th Cir.) (unfavorable opinion of case's merit does not provide basis for disqualification unless derived from extrajudicial sources), *cert. denied*, 484 U.S. 989 (1987). Furthermore, plaintiff fails to allege facts sufficient to suggest the "pervasive bias and prejduice" necessary to warrant recusal on the basis of attitudes developed during the course of the judicial proceeding. *See Page*, 828 F.2d at 1481.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MICHAEL O. TATUM, Plaintiff, vs. PHILIP MORRIS INCORPORATED, a foreign corporation and d/b/a PHILIP MORRIS USA, PHILIP MORRIS MANAGEMENT CORP., a foreign corporation, and RALPH RAYBURN, sued in his individual and representative capacities, Defendants.	)	No. CIV-90-1485-B (Filed Dec. 10, 1992)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court has before it for consideration the claims of Plaintiff, Michael O. Tatum, against Defendants, Philip Morris Incorporated ("Philip Morris"), Philip Morris Management Corp. ("Philip Morris Managment") and Ralph Rayburn (collectively "Defendants" unless specified). Mr. Tatum has alleged claims against Defendants for (i) violation of Title VII, 42 U.S.C. § 2000, *et seq.* for Philip Morris terminating his employment on the basis of his male gender; (ii) violation of Oklahoma public policy for Philip Morris terminating his employment on the basis of his male gender; (iii) tortious interference with contract, tortious interference with prospective employment, and tortious interference with prospective economic relations; (iv) defamation; (v) intentional infliction

of emotional distress; and (vi) negligent supervision/ respondeat superior against Philip Morris and Philip Morris Management.

In a trial held November 9 and 10, 1992, the court heard evidence on Mr. Tatum's claim under Title VII. The court holds and finds that Defendants are entitled to judgment on Mr. Tatum's Title VII claim for the reasons discussed below. Plaintiff's state law claims addressed by Defendants' Motion for Summary Judgment are dealt with under separate order.

BACKGROUND FACTS

The following background facts are undisputed in this case:

Mr. Tatum became employed by Philip Morris as a sales representative in Philip Morris' Oklahoma City office in April, 1985. Mr. Tatum was an at-will employee who was hired by Rick Mitchum, a long-time friend, who was at that time a division manager for Philip Morris. In May, 1987, Mr. Rayburn became Mr. Tatum's supervisor and supervised Mr. Tatum until Mr. Tatum's termination from employment on March 7, 1990.

On Friday, February 23, 1990, Philip Morris hosted a reception at the Green's Country Club in Oklahoma City in connection with the Virginia Slims Tennis Tournament which it sponsors. Invited to the reception were Philip Morris' customers and employees. Mr. Tatum attended the reception. During the reception, a decorative bottle of wine which belonged to the Country Club was stolen from the reception room. Mr. Tatum had asked Mr.

Rayburn during the course of the evening whether he could have the bottle of wine and was told he could not.

During the week of February 26, 1990, Mr. Rayburn and his supervisor, Alan Rexrode, questioned Mr. Tatum and others about the theft of the wine. Mr. Rexrode also contacted Philip Morris' Dallas Regional Office about the incident. Mr. Rexrode's supervisors in the Dallas Regional Office reviewed the incident and discussed the matter with Philip Morris' New York personnel office. On March 7, 1990, Mr. Rayburn, accompanied by Jimmy Lay, another manager in Philip Morris' Oklahoma City office, terminated Mr. Tatum's employment. Mr. Tatum was told that his employment was being terminated for his theft of the wine.

Mr. Tatum contends that he did not steal the wine. Mr. Tatum contends that Defendants fabricated the story of his stealing the wine as pretext to unlawfully discriminated against him in order to terminate his employment on the basis of his male gender. Mr. Tatum contends that Defendants' actions violated Title VII.

Defendants contend that Mr. Tatum was terminated only for his dishonesty for stealing the bottle of wine and for his insubordination for stealing the bottle of wine after being told by Mr. Rayburn and Mr. Lay that he could not have the bottle of wine. Defendants deny that Mr. Rayburn made the statements attributed to him and contend that Philip Morris Management is not a proper party to this case because none of its employees took any part in the decision to terminate Mr. Tatum's employment.

FINDINGS OF FACT

1. Mr. Tatum attempted at trial to establish that Philip Morris and Mr. Rayburn prefer to hire women and that Mr. Rayburn was instructed by his supervisors, Mr. Mitchum and Mr. Rexrode, to hire women. Mr. Tatum sought to establish this alleged policy by introducing Mr. Rayburn's past performance evaluations as part of Plaintiff's Exhibit No. 32 and contended that the "Affirmative Action" portion of the performance evaluations reflected this alleged policy. Mr. Rayburn testified during Mr. Tatum's case-in-chief that he has never been instructed to hire a female instead of a male but instead has always been instructed by his superiors to hire the most qualified applicant for any position. James Paddock, a section sales director in Philip Morris' Dallas Regional Office and Mr. Rayburn's indirect supervisor during the time Mr. Rayburn supervised Mr. Tatum, testified during Mr. Tatum's case-in-chief that he has always instructed his subordinates, including Mr. Rayburn, to hire the most qualified applicant and has not instructed them to hire females in preference to males. During Defendants' case-in-chief, Mr. Rexrode and Mr. Mitchum, Mr. Rayburn's direct supervisors during the time he supervised Mr. Tatum, also testified that they had instructed Mr. Rayburn to only hire the most qualified applicant and that had they noticed Mr. Rayburn giving preference to females in hiring or had they noticed Mr. Rayburn favoring females in any way, they would have disciplined him. The court finds the testimony of Mr. Rayburn, Mr. Rexrode, Mr. Mitchum and Mr. Paddock to be credible and finds that Philip Morris and Mr. Rayburn did not have a policy to hire females instead of males or to favor females over males in any situation and that Philip Morris and Mr. Rayburn sought

to hire the most qualified applicant for job openings, regardless of whether the applicants were male or female.

2. The court finds that Mr. Rayburn's performance evaluations show only that Philip Morris had a policy for its hiring managers to establish and maintain effective contacts and relations with employment agencies that would result in the hiring manager being able to obtain a pool of qualified applicants, including women and other minorities, when positions became available. Far from being discriminatory, this policy shows that Philip Morris desires to give equal employment opportunities to all. Furthermore, as a federal contractor, under executive order 11246, Philip Morris is required to give equal employment opportunities to all. Based on the testimony of Mr. Paddock, Mr. Mitchum, Mr. Rexrode and Mr. Rayburn, the court finds that even such statements in the performance evaluations as " . . . we should be looking to fill vacancies with females or minorities" are not indicative that females were to be given preference in hiring or that Mr. Mitchum and Mr. Rexrode had instructed Mr. Rayburn to hire females. Rather, such statements are part and parcel to the stated policy of establishing and maintaining effective contacts and relations with employment agencies to obtain a pool of qualified applicants and are only instructions to Mr. Rayburn to be sure to consider all applicants equally in the hiring process. This policy and Mr. Mitchum's and Mr. Rexrode's testimony is reflected and supported in another category of Mr. Rayburn's performance evaluations entitled "Responsibility: Recruiting and Selecting." In that category, Mr. Rayburn was praised for his ability to effectively use various recruiting sources and, as stated in Mr. Rayburn's performance evaluation

dated November 27, 1989, his ability to hire the best people to work for the company.

> You have made three new hires in the past year (Tracy Forsythe, Gary Cates, and Ron Spears). Based on the performance of each, all were good hire decisions. You always have an eye toward recruiting the best people to work for PM. Screening and interviewing practices are effective.

3. The only other "evidence" that Mr. Tatum submitted concerning Philip Morris' and Mr. Rayburn's alleged hiring practices that even merits discussion is the testimony of Raul Sanchez and Sam Azhari. Mr. Sanchez testified that Mr. Rayburn told him that he could not hire Mr. Sanchez for positions because he had to hire females to meet a quota. Mr. Rayburn's hiring practices are not at issue in this case, however. The only issue before the court is whether Plaintiff was terminated because of his male gender. Mr. Sanchez' testimony is therefore irrelevant and unable to be relied on by the court.

4. Mr. Azhari is a customer of Philip Morris. Mr. Azhari testified that on an occasion when Mr. Rayburn and Ms. Ramona Ayers visited his store shortly after Mr. Tatum's termination, Mr. Rayburn allegedly told him that women make better sales representatives than men and that Mr. Rayburn then made derogatory remarks to him about women. The court finds that Mr. Azhari's testimony is not credible. The allegations that Mr. Rayburn said that women make better sales representatives than men and then made derogatory remarks about women

are inconsistent. Further, the court finds credible the testimony of Mr. Rayburn and Ramona Ayers who both testified that Mr. Rayburn never made any such statements. Mr. Rayburn and Ms. Ayers also testified that on the two occasions they visited Mr. Azhari's store together they were never apart during the time they were at Mr. Azhari's store. Mr. Azhari testified that Mr. Rayburn made the alleged statements when Ms. Ayers went outside. The court believes that Mr. Azhari's testimony was influenced by the fact that Ms. Ayers, a Philip Morris sales representative, caught Mr. Azhari's brother stealing $1,500 worth of cigarette coupons from her during a call she made on Mr. Azhari's store. Even if Mr. Rayburn made the statement that women make better sales representatives than men, which the court does not believe, such a statement has nothing to do either with Mr. Tatum's performance as a sales representative as compared with the job performance of female sales representatives or with the reason for Mr. Tatum's termination from employment.

5. The court finds that Mr. Tatum presented no credible evidence at trial that Philip Morris favors women over men in hiring situations. This is particularly true when Mr. Rayburn's hiring record since he became a manager with hiring authority in Oklahoma is examined. Since that time, Mr. Rayburn has hired seven full-time employees. Four of the employees have been men, and three of the employees have been women. Mr. Rayburn has terminated three males other than Mr. Tatum, all of whom the court finds were terminated for cause. The fourth male that Mr. Rayburn has terminated was Mr.

Tatum who, as will be discussed below, was also terminated for cause. To replace the four terminated males, Mr. Rayburn hired two men and two women. This is hardly evidence that Mr. Rayburn prefers to hire women.

6. The issue in this case is not, however, whether Philip Morris and Mr. Rayburn prefer to hire women instead of men. Although Mr. Tatum has attempted to frame the issue in that light, the issue in this case is whether Mr. Tatum has presented any evidence that his employment was *terminated* because he is a male and whether Defendants intentionally discriminated against him because he is a male. The court finds that Mr. Tatum has not presented any evidence that Philip Morris and Mr. Rayburn have ever terminated a male employee's employment in order to hire a female and has not presented any evidence that his employment was terminated so that a female could be hired. The court finds that there is no evidence to support Mr. Tatum's claim that his employment was terminated because of his male gender.

7. What the evidence does show in this case, and the court believes the evidence to be clear and convincing, is that Mr. Tatum stole the bottle of wine from the Greens Country Club on February 23, 1990, and that Mr. Tatum's employment was terminated only because he stole the bottle of wine and because he stole the bottle of wine after being instructed by two supervisors not to take it. The evidence establishes that Mr. Tatum was both dishonest and insubordinate.

8. Defendants' evidence as to Mr. Tatum's theft of the bottle of wine consisted of the testimony of Vera

Kirby, Linda Rayburn, Lorraine Smoot, and Tracy Forsythe. The Court finds that the testimony of these witnesses was credible and, in fact, the court believes every word they said. Ms. Kirby is a sales representative for Philip Morris and has known Mr. Tatum for many years. She was present at the reception on February 23, 1990, and testified that Mr. Tatum called her name and showed her the bottle of wine in his possession, wrapped in t-shirts. Mrs. Rayburn, Ralph Rayburn's wife, testified that she saw Mr. Tatum standing by the guest table at the reception with the wine wrapped in t-shirts and observed Mr. Tatum leave the reception with the bottle of wine in his possession. Ms. Forsythe, another Philip Morris sales representative, also testified that she observed Mr. Tatum leave the reception with the bottle of wine wrapped in t-shirts. Lorraine Smoot, also a sales representative for Philip Morris, testified that she saw Mr. Tatum take the bottle of wine and place it under the guest table, stand up with the bottle wrapped in t-shirts, and later exit the reception with the bottle wrapped in t-shirts. The court finds that the testimony presented by Ms. Kirby, Mrs. Rayburn, Ms. Forsythe, and Ms. Smoot establishes that Mr. Tatum did in fact steal the bottle of wine. The court makes a specific finding that Mr. Tatum did steal the bottle of wine from the reception at the Greens Country Club on February 23, 1990.

9. Plaintiff contends that Ms. Kirby, Mrs. Rayburn, Ms. Forsythe, and Ms. Smoot made up the incident because they are related to Mr. Rayburn, and that Ms. Kirby, Ms. Forsythe and Ms. Smoot are lying about the incident to save their jobs. The court finds that there is no basis for these contentions. It is the court's understanding

that Ms. Smoot and Ms. Forsythe are sisters, and that their brother is married to Mrs. Rayburn's sister. Ms. Smoot and Ms. Forsythe are not related to Mr. and Mrs. Rayburn. There is no evidence that the story about Mr. Tatum's stealing the bottle of wine was fabricated. The court finds it inconceivable under these circumstances that Ms. Kirby, Ms. Forsythe and Ms. Smoot would lie about a co-worker to save their jobs. To the contrary, the court has found that Mr. Tatum stole the wine and that the witnesses who saw him steal it are telling the truth.

10. After Mr. Rayburn was informed by his wife, on Sunday, February 25, 1990, about the incident, the next working day Mr. Rayburn advised Mr. Rexrode that Mr. Tatum had been seen stealing the wine. Mr. Rexrode reported the incident to his supervisor, Mr. Paddock, who instructed Mr. Rexrode to investigate the matter. Mr. Paddock was kept advised by Mr. Rexrode about the status of the investigation. Mr. Lay, who had been asked by Mr. Tatum whether he could take the wine, and the eyewitnesses to Mr. Tatum's act of theft were consulted by Mr. Rayburn and Mr. Rexrode, as was Mr. Tatum. Mr. Paddock discussed the matter on several occasions with his supervisor, Charles Finch, Regional Vice President of Sales, and consulted on several occasions with Rosemary Milton, Regional employee Relations Manager. Ms. Milton consulted with Philip Morris' New York City personnel office to ensure that Mr. Tatum's conduct warranted termination and that termination was consistent with company policy and past company actions, and obtained the necessary approvals for terminating Mr. Tatum's employment. Mr. Paddock, before a final decision was reached to terminate Mr. Tatum's employment, instructed

Mr. Rayburn and Mr. Rexrode to obtain written statements from Ms. Forsythe, Ms. Smoot and Mrs. Rayburn.[1] The court finds that a reasonable investigation into Mr. Tatum's theft of the bottle of wine was conducted and that it was designed to ensure that Mr. Tatum was treated fairly.

11. The court finds that Mr. Tatum's employment was terminated only because of his dishonesty for stealing the bottle of wine and for his insubordination for stealing the bottle of wine after being told by Mr. Rayburn and Mr. Lay that he could not take the bottle of wine. There has been no evidence presented to the court that there was any other reason for Mr. Tatum's termination from employment.

12. The court finds that Mr. Tatum's employment was terminated for cause because he stole the bottle of wine and did so after being told by two supervisors not to take it. The court finds that Mr. Tatum was both dishonest and insubordinate.

13. On rebuttal, Mr. Tatum presented two witnesses, Kathy Vernon and Delores Welch, who testified that they saw Plaintiff after he left the reception and that he did not have a bottle of wine. Mr. Tatum also testified that he did not take the bottle of wine. After observing these witnesses, the court is of the opinion that no credibility

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[1] Mrs. Rayburn's written statement was not obtained until one day after Mr. Tatum's termination because Mr. Rayburn, Mr. Rexrode, Mr. Paddock, Ms. Smoot, and Ms. Forsythe were present at a meeting in Tulsa when Ms. Smoot's and Ms. Forsythe's statements were obtained, while Mrs. Rayburn was in Oklahoma City.

can be attached to their testimony. Ms. Vernon is a disgruntled former employee of Philip Morris who is contemplating litigation against the company, and the court has serious doubts that Ms. Vernon was even at the reception as she contends. Several persons who attended the reception testified that they did not see Ms. Vernon at the reception. Ms. Vernon's testimony about the reception, including the weather at that time, is markedly different from that of Defendants' witnesses. Ms. Welch is also not a credible witness. Her testimony about her attendance at the Greens Country Club that night is not credible. Mr. Tatum's testimony that he did not steal the bottle of wine is not believed by the court because the court gives great weight to and believes the testimony of Ms. Kirby, Ms. Rayburn, Ms. Forsythe and Ms. Smoot.

14. The court finds that no employee of Philip Morris Management was in any manner involved in the decision to terminate Mr. Tatum's employment. Philip Morris Management is not a proper party to this case, and Plaintiff should not have sued Philip Morris Management.

15. The court finds that Philip Morris and Mr. Rayburn reasonably believed that Mr. Tatum stole the bottle of wine and that they terminated his employment for that reason and not for discriminatory reasons.

16. The court finds that Mr. Tatum has presented no credible evidence to support his claim that his employment was terminated because of his male gender. Mr. Tatum's evidence is so weak that the court is of the opinion that this case should never have been filed. Mr.

Tatum stole the bottle of wine, was dishonest, was insubordinate, and was justifiably terminated, yet he still filed a claim alleging that he was unlawfully discriminated against on the basis of his gender. There is no basis in fact for such a claim and the filing of such a claim is inconceivable in light of the overwhelming evidence against it.

CONCLUSIONS OF LAW

1. Where, as here, a plaintiff can present no direct evidence that the defendant employer intentionally discriminated against him because of his male gender, he must follow the three-part test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 668 (1973), for evaluation of Title VII disparate treatment claims. Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of intentional discrimination. If plaintiff carries his initial burden, the burden shifts to defendants to articulate some legitimate non-discriminatory reason for the challenged workplace decision. If the defendant carries this burden of production, the plaintiff has an opportunity to prove that the legitimate reasons defendants offered were merely a pretext for discrimination. The plaintiff has at all times the burden to establish his case by a preponderance of the evidence.

2. Under *McDonnell Douglas*, to establish a prima facie case of discriminatory discharge, a plaintiff must normally prove that (i) he belongs to a protected class; (ii) he was qualified for his job; (iii) he was terminated despite his qualifications; and (iv) after he was terminated, his job remained open and the employer sought

applicants whose qualifications were no better than plaintiff's. *Trujilio v. Grand Junction Regional Center*, 928 F.2d 973, 977 (10th Cir. 1991). Where a member of a historically favored group is alleging reverse discrimination as Mr. Tatum is here, it is appropriate to adjust the prima facie case. Mr. Tatum must, in lieu of showing that he belongs to a protected class, establish background circumstances that support an inference that Philip Morris and Mr. Rayburn are those unusual employers who discriminate against the majority. Mr. Tatum was required to allege and produce evidence to support specific facts sufficient to support a reasonable inference that, but for Mr. Tatum's male gender, he would not have been terminated. *Notari v. Denver Water Dept.*, 971 F.2d 585, 589-90 (10th Cir. 1992); *Livingston v. Roadway Express Inc.*, 802 F.2d 1250 (10th Cir. 1986).

3. The court is of the opinion that Mr. Tatum did not establish a prima facie case of intentional discrimination. Mr. Tatum, during his case-in-chief, presented no evidence that he was terminated because of his male gender. At best, all Mr. Tatum did was to introduce evidence concerning Philip Morris' policy of requiring a hiring manager to establish and maintain effective contacts and relations with employment agencies that would result in the hiring manager being able to obtain a pool of qualified applicants, including women and other minorities. Further, the evidence presented during Mr. Tatum's case-in-chief showed that every male whose employment was terminated by Mr. Rayburn was terminated for cause and for a non-discriminatory reason. Mr. Tatum wholly failed to establish any background circumstances showing that Philip Morris and Mr. Rayburn are the unusual

employers who discriminate against the majority and therefore did not meet his burden of establishing a prima facie case. However, because the court proceeded to hear all the evidence both sides had to present, whether Mr. Tatum established his prima facie case is not germane.

4. Pursuant to the *McDonnell Douglas* method, Defendants established a legitimate, non-discriminatory reason for their business decision to terminate Mr. Tatum's employment. Mr. Tatum was terminated only because of his dishonesty for stealing the wine and for his insubordination for stealing the wine after being told by two superiors that he could not take the wine. Mr. Tatum's dishonesty and insubordination constituted violations of company policy and justified his termination from employment under Philip Morris' company policy.

5. While Mr. Tatum may generally dispute whether his theft of the wine and his insubordination should have been grounds for his termination from employment, such a dispute does not provide a sufficient basis for an inference or finding that Defendants discriminated against Mr. Tatum on the basis of his male gender. The finder of fact is not to second guess an employer's business judgment that a plaintiff's conduct warranted his termination from employment. The fact finder does not sit as a super personnel department that can re-examine an employer's business decisions, and a plaintiff must do more than challenge the business judgment of his former employer. *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 747 (10th Cir. 1991); *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988). As discussed, even if Plaintiff did not steal the bottle of wine, which the court believes that he did and has so found, the court has also found that Philip

Morris and Mr. Rayburn were reasonable in their belief that Mr. Tatum stole the bottle of wine and were therefore justified in terminating his employment pursuant to company policy.

6. Under *McDonnell Douglas*, once a defendant articulates a legitimate, non-discriminatory reason for its business decision, the plaintiff is to be given the opportunity to show that the articulated, non-discriminatory business reason is a pretext for discrimination. The court holds and finds that, after Defendants presented their evidence, Mr. Tatum presented no credible evidence that Philip Morris' decision to terminate Mr. Tatum's employment because of his dishonesty and his insubordination was a pretext for unlawful discrimination. The court holds and finds that the only reasons for Mr. Tatum's termination from employment were his theft of the bottle of wine and his insubordination and holds and finds that Mr. Tatum's male gender played no part in the decision to terminate his employment.

7. Mr. Tatum has failed to establish by a preponderance of the evidence that his employment was terminated because of his male gender and that Defendants intentionally discriminated against him. There is no basis in law for Mr. Tatum's claim that Defendants violated Title VII. Like the factual basis for his Title VII claim, the legal basis for Mr. Tatum's claim that Defendants violated Title VII is so weak that it is inconceivable that Mr. Tatum filed a Title VII against Defendants.

CONCLUSION

Defendants are entitled to judgment in their favor on Mr. Tatum's claim that they violated Title VII by terminating Mr. Tatum's employment on the basis of his male gender. There is no credible evidence that Mr. Tatum was terminated due to his male gender. The evidence against such a claim is so overwhelming that Mr. Tatum should not have filed his Title VII claim. There is no basis in either fact or law for Mr. Tatum's claim that he was terminated because of his male gender.

An appropriate judgment will accordingly be filed herein.

Dated this 10th day of December, 1992.

/s/ Luther Bohanon
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

MICHAEL O. TATUM, Plaintiff, v. PHILIP MORRIS INCORPORATED, a foreign corporation and d/b/a PHILIP MORRIS USA, PHILIP MORRIS MANAGEMENT CORP., a foreign corporation, and RALPH RAYBURN, sued in his individual and representative capacities, Defendants.	)	Case No. CIV-90-1485-B (Filed Dec. 10, 1992)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the court on Defendants, Philip Morris Incorporated ("Philip Morris'), Philip Morris Management Corporation ("Philip Morris Management") and Ralph Rayburn's (collectively "Defendants" unless specified) motion for summary judgment filed on October 7, 1992. Plaintiff's response was filed October 22, 1992, and Defendants' reply on October 29, 1992. The court heard oral argument on the motion on November 4, 1992, at which time the court took the motion under advisement. On November 9-10, 1992, Plaintiff tried his Title VII claim, 42 U.S.C. § 2000e *et seq*, to the court thus implicitly denying Defendants' motion as to that claim. During the course of the non-jury trial, Defendants asserted and twice reasserted their motion for

summary judgment on Plaintiff's pendent claims. After further review of the motion, supporting brief and attached exhibits, response thereto with attached exhibits, and Defendants' reply with attached exhibits, the court determines that Defendants' motion for summary judgment on Plaintiff's pendent state law claims should be granted. The court wishes to make clear, however, that in ruling on Defendants' motion for summary judgment, it has not relied in any way on the evidence presented in the non-jury trial. The court's grant of summary judgment is based solely on the evidence presented by the motion, briefs and exhibits presented by the parties to the motion.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P. 56(c). On a summary judgment motion, the court is required to pierce the pleadings and evaluate the actual proof to determine whether summary judgment is appropriate. *Id.* at Advisory Committee Notes. In determining whether a genuine issue of material fact exists, all facts and inferences should be viewed in the light most favorable to the nonmoving party. *Burnette v. Dow Chemical Co.*, 849 F.2d 1269 (10th Cir. 1988). However, on a defendant's motion for summary judgment:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The Supreme Court defined the evidentiary burdens in summary judgment cases in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Once the defendant meets the *Celotex* requirement, the burdens [sic] shifts to plaintiff to show that there is a "*genuine* issue of *material* fact." *Id.* at 248 (emphasis in original). A dispute is "genuine" "if a reasonable jury could return a verdict for the nonmoving party." *Id.* The court held that after plaintiff responds to the motion, the Trial Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 251-52. "The mere existence of a scintilla of evidence in support of the [plaintiff's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [plaintiff]. *Id.* at 252.

These cases furnished the basis for the Tenth Circuit's statement in *Burnette v. Dow Chem. Co.*, 849 F.2d 1269 (10th Cir. 1988), that although the facts and inferences must be viewed in plaintiff's favor on defendant's

motion, "even under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Id.* at 1273. These cases cast a heavy burden on Plaintiff in this case since the undisputed material facts show that Defendants are entitled to judgment.

Plaintiff's remaining state law causes of action allege that: (1) because Defendants terminated his employment on the basis of reverse discrimination, they violated the public policy of the State of Oklahoma; (2) defendants tortiously interfered with contractual relations Plaintiff had with prospective employers, prospective employment, and with Plaintiff's prospective economic relations; (3) Defendants defamed Plaintiff; (4) Defendants intentionally inflicted emotional distress on Plaintiff; and (5) Philip Morris and Philip Morris Management negligently retained Defendant Rayburn.

Undisputed Facts

Plaintiff was employed by Philip Morris as a sales representative in the Oklahoma City area from April, 1985, until March 7, 1990. From May, 1987, until March 7, 1990, Plaintiff was supervised by Defendant Rayburn. Plaintiff's employment was terminated on march 7, 1990, the reason for which is the subject matter of this lawsuit. Plaintiff alleges that his employment was terminated because he was a male. Defendants contend that Plaintiff was fired for stealing a bottle of wine and for insubordination.

It is undisputed that Plaintiff attended a reception sponsored by Philip Morris at the Greens Country Club

in Oklahoma City on Friday, February 23, 1990. What occurred at the reception is vigorously disputed by the parties. However, it is undisputed that throughout the course of the evening, Plaintiff asked Defendant Rayburn whether he could take a decorative bottle of wine as a souvenir [sic]. Rayburn told him that he should not. It is also undisputed that Defendant Rayburn's wife informed him on February 25, 1990, that she and two other employees had seen Plaintiff take a bottle of wine from the country club. At Rayburn's supervisor's request, an investigation was launched into whether Plaintiff had actually stolen the wine. Defendant Rayburn and his supervisor Alan Rexrode, questioned Plaintiff about the incident. Plaintiff denied that he had taken the bottle of wine. Mr. Rexrode then questioned the two employees about what they had seen the evening of the reception. It was subsequently decided by Defendant Rayburn's supervisor and a representative of the Dallas regional office, Mr. James Paddock, that Plaintiff's employment be terminated based on their belief that Plaintiff had taken the bottle of wine. Written statements were then taken from Rayburn's wife and the two employees.

Mr. Rayburn did not at the time Plaintiff was terminated and does not at the present possess the authority to terminate the employment of any employee without the approval of his supervisor, Philip Morris representatives in the Dallas regional office, and Philip Morris' New York personnel office. Defendant Rayburn did not terminate any employees, male or female, while he was Division Manager in Dallas.

Since he has been Division Manager in Oklahoma City, he has terminated four male employees, including

Plaintiff. John Balentine was terminated for unexcused absences from work. Bobby Blanton was terminated because he falsified company records. Smith Steigleder's employment was terminated for shortages in his consignment fund. Plaintiff was the fourth male terminated by Defendant Rayburn on direction from his superiors.

When Mr. Balentine's employment was terminated, he was replaced by Mr. Blanton, a male. Mr. Blanton was replaced by Gary Cates, also a male. Mr. Cates was transferred to another territory still under the supervision of Defendant Rayburn. He was replaced by Ron Spears, another male. Upon Mr. Steigleder's termination, he was replaced by a female, Tracy Forsythe. Plaintiff was also replaced by a female, Ramona Ayers. Mr. Rayburn has hired in Oklahoma four full-time male employees and three full-time female employees. Plaintiff fails to allege or provide any evidence on the job qualifications of either Ms. Forsythe or Ms. Ayers.

In addition, Defendant Rayburn currently supervises a sales work force consisting of four females and three males. However, prior to Plaintiff's termination and replacement by Ms. Ayers, Rayburn supervised three females and four males, a ratio which was identical to Philip Morris' national sales force.

Plaintiff alleges that he was denied employment after his termination by Philip Morris because of statements allegedly made by Defendant Rayburn to three prospective employers, Dyana Azarpur, Richard Phillips and Sam Azhari. Plaintiff fails to identify any other prospective

employers who refused to provide employment for Plaintiff because of statements allegedly made by Defendant Rayburn.

Ms. Azarpour testified that she failed to hire Plaintiff because (1) she did not want him to be uncomfortable dealing with the situation of a Philip Morris representative calling on her store; and, (2) she could not pay him the amount of money he needed. Ms. Azarpour also testified that any statement made by Defendant Rayburn did not affect her employment decision.

Plaintiff did not seek employment with Mr. Phillips and, even if he had, Mr. Phillips had no job opening at the time. Mr. Phillips testified that he holds Plaintiff in high regard, and any stories going around about the reason for Plaintiff's termination would not have affected any hiring decision.

Mr. Azhari testified that he heard about Plaintiff's termination from his brother, Harry Azhari, who had heard it from the RJR sales representative, Linda. Defendant Rayburn then confirmed to Mr. Azhari that Plaintiff had been terminated for stealing a vase at a meeting in Louisiana. The rumor that Mr. Azhari heard affected his decision to not hire Plaintiff, and he would not have hired Plaintiff even if Defendant Rayburn had not "confirmed" the rumor.

Both Defendant Rayburn and Plaintiff testified in deposition about a conversation Mr. Rayburn had with Mr. Lamun and Mr. Wolfe at Consolidated Wholesale, one of Plaintiff's accounts. During the course of the meeting, Mr. Lamun asked Mr. Rayburn if it was true that Plaintiff had been terminated for taking a bottle of wine. Mr.

Rayburn confirmed that Plaintiff had been terminated in regards to the wine incident, but that Mr. Rayburn did not believe that Plaintiff had actually stolen the bottle of wine.

Philip Morris and Philip Morris Management are separate both subsidiaries of the same holding company, but they are separate companies. No one employed by Philip Morris Management participated in the decision to terminate Plaintiff's employment. The only connection Philip Morris Management has to this case is the inquiry made by Plaintiff after his termination to which a representative of Philip Morris Management responded indicating that Philip Morris Management would investigate the legality of Plaintiff's termination.

Plaintiff's wrongful discharge claim

To prevail on his wrongful discharge claim, Plaintiff must produce evidence showing that Defendants discriminated against him. The court finds that Mr. Tatum has failed to produce any evidence that gives rise to a genuine issue of material fact on his public policy claim.

The evidence Plaintiff relies on to show gender-based discrimination is the following: (1) Mr. Rayburn hires and has a larger contingent of females than males; (2) the gender composition of Mr. Rayburn's division is disproportionate to that of Philip Morris' national sales force; (3) Mr. Rayburn's division in Texas was known as the "North Hollywood Division" because of its "higher female compliment"; (4) Philip Morris advertises for only part-time positions rather than full-time positions; (5) Mr. Rayburn has systematically terminated male employees

in Texas and Oklahoma and replaced them with lesser qualified females; (6) Mr. Rayburn allegedly told Mr. Azhari that he prefers female sales representatives and makes derogatory remarks about women; (7) Mr. Rayburn stated to Mr. Azhari that women make better sales representatives than men; (8) Ms. Kathy Vernon believes that Mr. Rayburn prefers young and attractive females to males; (9) Ms. Dyana Azarpur believes that Mr. Rayburn wanted his "little girls" as sales representatives; and (10) Mr. Tatum did not take the bottle of wine.

Viewing Plaintiff's evidence in a light most favorable to Plaintiff, as a court must on a motion for summary judgment, the court finds that the evidence submitted by Plaintiff is insufficient to raise an issue of disputed material fact about whether Mr. Tatum's employment was terminated because of his male gender. Specifically, the undisputed facts show: (1) Mr. Rayburn has hired in Oklahoma four full-time employees and three full-time female employees; (2) until Plaintiff's termination, Defendant Rayburn's division was comprised of four male employees and three female employees, a number consistent with the national sales force. After Plaintiff's termination and Ms. Ayers' hiring, the division consisted of three males and four females; (3) Mr. Rayburn did not hire the individuals who comprised his "North Hollywood Division", and it is undisputed that they were assigned to him; (4) whether Philip Morris advertises for positions is immaterial to Plaintiff's claim that he was terminated for his male gender; (5) it is undisputed in this case that Defendant Rayburn did not terminate any employees while he was employed by Philip Morris in Texas, Plaintiff has admitted that he knows nothing of Mr.

Rayburn's record of terminating employees in Texas, the only male employees terminated by Mr. Rayburn in Oklahoma were terminated for cause, and two of the four male employees whom Mr. Rayburn terminated were replaced by males; (6) the allegation that Mr. Rayburn prefers female sales representatives but at the same time makes derogatory comments about women is simply inconsistent and is not evidence that Plaintiff's employment was terminated because he is a male; (7) whether or not Defendant Rayburn stated that women make better sales representatives than men is immaterial because such a statement, even if made, has nothing to do with Plaintiff's performance as a sales representative as compared with the performance of female sales representatives, and at best can best be considered only a generalization. Also, Mr. Rayburn's hiring record of four full-time male employees and three full-time female employees belies a preference for female sales representatives; (8) the allegation that Mr. Rayburn prefers young and attractive females is not a fact, but rather is conjecture on the part of Ms. Vernon. According to Ms. Vernon's deposition testimony, she believes that Mr. Rayburn prefers young and attractive *people*, not *females*, and admits that she does not know what attributes or qualifications Mr. Rayburn looks for in a sales representative; (9) the evidence that Mr. Rayburn wanted his "little girls" as sales representatives cannot support Plaintiff's claim that he was terminated because of his male gender. Plaintiff attributes the foregoing statement to Ms. Azarpour, and any such statement is only Ms. Azarpour's conjecture. Ms. Azarpour is not an employee of Philip Morris, she provided no basis for her opinion other than she "just knows it", and this

allegation is again belied by the fact that Mr. Rayburn has hired more males than females for full-time positions in Oklahoma, and Plaintiff admits, Mr. Rayburn has terminated males only for cause; (10) while Plaintiff states that he did not take the bottle of wine, he has provided no evidence that representatives of Philip Morris did not believe that he stole the bottle of wine at the time he was terminated and has produced no evidence that his termination was for any acts other than his acts of theft and insubordination.

Defendants, on the other hand, have produced specific evidence which Plaintiff failed to dispute that his employment was terminated only because of his dishonesty for stealing the bottle of wine and for insubordination. This evidence was presented in the form of the affidavits of Mr. Rayburn and Mr. Paddock. In the affidavits, they stated that the only reasons for Plaintiff's termination were his dishonesty and insubordination. Defendant Rayburn and Mr. Paddock both stated in their affidavits that the fact that Plaintiff is a male was not considered in the decision to terminate Plaintiff's employment and his male gender had nothing to do with the reasons for his termination.

In regard to evidence that could be indicative of discrimination, past terminations, Plaintiff admits that, other than himself, no male employee has been terminated by Mr. Rayburn for any reason other than for cause. No inference of discrimination can be drawn from prior terminations if, as the court finds, all of the past terminations were for cause. In fact, two of the males that were terminated, Bobby Blanton and John Balentine, signed affidavits which were presented with Defendants'

motion for summary judgment stating that they had been terminated for cause, that their termination was justified, and that they did not believe that there was any discrimination in their terminations. Also, if Mr. Rayburn were terminating men in order to replace them with lesser qualified women, as Plaintiff alleges, it would seem that all of the men would have been replaced by women. However, as Plaintiff admits, two the four terminated males were replaced by males and two were replaced by females. Plaintiff also admits that he knows nothing about the qualifications of the two women who were hired to replace the terminated males.

The court finds that there is no genuine issue as to any material fact that precludes Defendants from obtaining summary judgment on Plaintiff's claim that Defendants violated the public policy of Oklahoma. The court finds that the undisputed evidence presented to the court establishes that Plaintiff's employment was terminated for dishonesty and insubordination and that his male gender played no part in the decision to terminate his employment. The undisputed evidence also establishes that Defendants believed Plaintiff stole the bottle of wine and terminated his employment based only upon that belief.

Under *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218 (Okla. 1992), a cause of action for violation of public policy exists when a plaintiff is terminated for a discriminatory reason. The inquiry on summary judgment is whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. A party must designate specific facts

showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323-24. A witness' conjecture is not evidence, does not raise an inference of discrimination, and does not allow a plaintiff to avoid summary judgment. *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988).

Pursuant to Fed. R. Civ. P. 56, the court finds that Defendants are entitled to summary judgment as a matter of law on Plaintiff's claim for violation of Oklahoma public policy. The court finds that Plaintiff has not presented sufficient evidence to raise a genuine issue of material fact as to his wrongful discharge claim.

Plaintiff's Claims for Tortious Interference

Plaintiff's complaint alleges that, subsequent to his termination from employment, Defendant Rayburn informed "prospective employers" that Plaintiff had been discharged from employment with Philip Morris for dishonesty and theft. Plaintiff alleges that these statements caused him to be deprived of advantageous contract, employment and economic relations. The alleged prospective employers were Dyana Azarpour, Richard Phillips, and Sam Azhari, who were also customers of Philip Morris. Plaintiff called on these customers during his employment with Philip Morris. Plaintiff also contends for the first time in the lawsuit in responding to Defendants' motion for summary judgment, that Defendants' alleged conduct tortiously interfered with contracts, employment and prospective economic relations with unnamed "prospective employers."

Under Oklahoma law, the elements of a cause of action for tortious interference with contract are (i) that the plaintiff had a contractual right that was interfered with; (ii) that the interference was malicious and wrongful and that such interference was neither justified, privileged nor excusable; and (iii) damage was proximately sustained as a result of the complained interference. *Ellison v. An-Son Corp.*, 751 P.2d 1102, 1106 (Okla. App. 1987). The right to recover for the unlawful interference with the performance of a contract presupposes the existence of a valid enforceable contract. *Id.* at 1106.

Plaintiff has not alleged that he had a contract with Ms. Azarpour, Mr. Phillips, Mr. Azhari or any unnamed "prospective employer." Because Plaintiff fails to even allege that he had a contract with any prospective employer, his claim for tortious interference with contract must fail.

In addition to failing to allege the existence of contracts, Plaintiff's claim for tortius interference with contract must fail because neither Ms. Azarpour, Mr. Phillips, nor Mr. Azhari failed to honor "contracts" with Plaintiff because of any statement allegedly attributable to Defendant Rayburn. Plaintiff, in fact, admits Defendants' Undisputed Material Fact Nos. 9 and 10. In their Undisputed Material Fact No. 9 based on Mrs. Azarpour's deposition testimony, Defendants state that Ms. Azarpour did not fail to hire Plaintiff because of any statements allegedly made by Defendant Rayburn, but rather only failed to hire him because she did not want Plaintiff to have to deal with working with Philip Morris representatives who called on her store, and because she did not

believe she could pay Plaintiff an adequate salary. Defendants state in their Undisputed Material Fact No. 10 based on Mr. Phillips' deposition testimony, that Mr. Phillips had no openings in his grocery store and that had a position been available any alleged statements by Mr. Rayburn would not have had any impact on Mr. Phillips' hiring decision. Mr. Azhari's decision not to hire Plaintiff was based upon statements he heard from third parties other than Mr. Rayburn, and he would not have hired Plaintiff based on those statements even if Defendant Rayburn had never made any statements to him.

Plaintiff admitted during his deposition testimony that he knew of no prospective employers other than Ms. Azarpour, Mr. Phillips and Mr. Azhari who allegedly denied him employment because of statements made by Mr. Rayburn. Because Plaintiff has produced no evidence that he had contract with other "prospective employers", any claim regarding unidentified persons must fail.

Plaintiff's claim for tortious interference with contract must fail also because he did not suffer any damage. He alleged the existence of no contracts and, if no contracts existed, Plaintiff could not have been damaged.

A claim for tortious interference with employment presupposes an employment relationship. *Haynes v. South Com. Hosp. Mgmt, Inc.*, 793 P.2d 303 (Okla. 1990). Plaintiff had no employment relationship with any "prospective employer" and, as discussed, any "prospective employer" never contemplated an employment relationship. Again, Plaintiff suffered no damage.

A claim for tortious interference with prospective economic relations involves interference with a reasonable expectation of profit. *Overbeck v. Quaker Life Ins. Co.*, 757 P.2d 846 (Okla. App. 1988). Any statements allegedly made by Defendant Rayburn did not interfere with Plaintiff's prospective economic relations because neither Ms. Azarpour, Mr. Phillips, Mr. Azhari, nor any unnamed "prospective employer" failed to hire Plaintiff because of any statements allegedly made by Mr. Rayburn. Plaintiff had no reasonable expectation of profit and suffered no damage.

Defendants are entitled to summary judgment on Plaintiff's claims for tortious interference with contract, employment and prospective economic relations. Plaintiff has failed to submit any evidence that Defendants tortiously interfered with a contract, employment or prospective economic relations. To the contrary, the evidence presented to the court is undisputed that none of the alleged prospective employers Plaintiff specifies ever intended that any kind of a contractual, employment or economic relationship between themselves and Plaintiff would exist.

Plaintiff's Claim for Intentional Infliction of Emotional Distress

Plaintiff contends that Mr. Rayburn's alleged statements to Ms. Azarpour, Mr. Phillips, Mr. Azhari and unnamed "prospective employers" concerning the reason for Plaintiff's termination from employment give rise to a cause of action for intentional infliction of emotional distress. According to Plaintiff, the following acts give

rise to his cause of action: (i) Mr. Rexrode instructed Plaintiff at one time to take unauthorized "mag" wheels off of his company van in order to reduce the likelihood of theft and Plaintiff believed that Mr. Rexrode was "out to get him"; (ii) Mr. Mitchum, Plaintiff's former supervisor and the individual who hired him, worried about "climbing the corporate ladder" and went along with whoever planned the "scheme" to terminate Plaintiff; (iii) Philip Morris "allowed" Mr. Rayburn to make the statements Plaintiff attributes to him; and (iv) Philip Morris Management did not conduct an investigation into Plaintiff's termination after the fact. Plaintiff also contends, without citation to authority, that his claim for intentional infliction of emotional distress turns on whether he actually stole the bottle of wine from the country club.

However, the issue on Plaintiff's claim for intentional infliction of emotional distress is not whether he did or did not steal the bottle of wine, but rather is whether Defendants' conduct rises to the level necessary to support the claim. This issue is initially one of law for the court and liability may be found only where a defendant's conduct has been extreme and outrageous:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly

> intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'.

Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986); *Bostwick v. Atlas Ironmasters, Inc.*, 780 P.2d 1184, 1188 (Okla. App. 1988); *Pytlik v. Professional Resources, Ltd.*, 887 F.2d 1371, 1379 (10th Cir. 1989); Restatement (Second) Torts, § 46.

Even if Plaintiff's allegations are true, as a matter of law Defendants' alleged conduct dies [sic] not rise to the level necessary to support a claim for intentional infliction of emotional distress. As the above-quoted language shows, Plaintiff's allegations that Defendant Rayburn told certain persons the reason for his termination does not even rise to the necessary level. Further, even Plaintiff does not contend that Mr. Rayburn intentionally meant to upset him and, as for Philip Morris' intent to harm him, Plaintiff believes that the company was neutral. The alleged conduct my [sic] Mr. Rexrode, Mr. Mitchum, and Philip Morris Management, even if true, simply does not rise to the level of "outrageous" conduct necessary for Plaintiff to sustain his claims. As a matter of law, the court finds that such conduct does not rise to the level necessary to support a claim for intentional infliction of emotional distress. The court finds that Defendants are entitled to summary judgment on Plaintiff's claim for intentional infliction of emotional distress.

Plaintiff's Claim for Defamation

Plaintiff alleges that he was defamed by (i) Defendant Rayburn telling Ms. Azarpour that he had been terminated for stealing a bottle of wine; (ii) by Defendant Rayburn telling Mr. Phillips that Plaintiff had been terminated for stealing a vase; (iii) by Defendant Rayburn allegedly telling Mr. Azhari that Plaintiff had been terminated for stealing an antique vase; (iv) by employees of Philip Morris telling other employees of Philip Morris that Plaintiff had been terminated and the reasons therefore; (v) by Philip Morris sending a letter to the Oklahoma Employment Security Commission ("OESC") explaining the reasons for Plaintiff's termination; (vi) by Defendant Rayburn telling two employees at Consolidated Wholesale after having been asked by those employees, at Plaintiff's request, the reason for Plaintiff's termination; and (vii) by Plaintiff informing unnamed "prospective employers" the reason for his termination.

Under Okla. Stat. tit. 12, § 1442(3), the slander Plaintiff apparently contends occurred is defined as a false and unprivileged communication which tends directly to injure an individual in respect to his business, either by imputing to him general disqualification in those respects in which his business peculiarly requires, or by imputing something with reference to the individual's business that has a natural tendency to lessen its profit. As a defense to a claim of slander, a defendant may deny and offer evidence to disprove the charges made or he may prove that the matter charged as defamatory was true and, in addition thereto, that it was published or spoken under such circumstances as to render it a privileged communication. Okla. Stat. tit. 12, § 1444.1.

In a defamation case, it must be determine [sic], under all of the existing circumstances, that the recipients of the alleged communication attributed the same defamatory imputations as the plaintiff did to the language used in the communication. *M.F. Patterson Dental Supply Co. v. Wadley,* 401 F.2d 167, 169 (10th Cir. 1968). The issue in a defamation case is whether the plaintiff's reputation has been harmed. It is the injury to reputation and not to the feelings of the individual that is the subject of redress. The language in the alleged defamatory communication must tend to lower the plaintiff in the estimation of men whose standard of opinion the court can recognize. *Wiley v. Oklahoma Press Pub. Co.,* 106 Okla. 52, 233 P. 224 (1924).

Plaintiff did not produce the testimony or affidavit of a single individual who believed that he stole the bottle of wine, who does not consider Plaintiff to be an honest and honorable person, or who considers that Plaintiff is not fit to conduct business because of statements attributed to Defendant Rayburn. Plaintiff's reputation, both personal and business, has not been harmed because of statements he attributes to Mr. Rayburn. Ms. Azarpour did not believe the statements allegedly made and the alleged statements did not affect her opinion of Plaintiff in any manner. She did not fail to hire Plaintiff because of statements attributed to Defendant Rayburn. Ms. Azarpour still believes Plaintiff is an honorable and honest individual and even signed a "character letter" to that effect.

Mr. Phillips did not believe that Plaintiff stole the bottle of wine and his opinion of Plaintiff's reputation was not impacted in any manner by any statements attributed to Defendant Rayburn. Mr. Phillips would

have hired Plaintiff even after hearing about Plaintiff's stealing the wine.

While Mr. Rayburn did meet with Mr. Lamun and Mr. Wolfe of Consolidated Wholesale, he met with them after Plaintiff had informed them of the reason for his termination, and Plaintiff was well aware that they were going to meet with Mr. Rayburn. At that meeting, according to Plaintiff, Mr. Rayburn inform [sic] them only that Plaintiff had been terminated for stealing wine and even informed them, again according to Plaintiff, that he did not believe Plaintiff took the bottle of wine. According to Plaintiff, neither Mr. Lamun or Mr. Wolfe believed that Plaintiff took the wine, and Mr. Wolfe even signed a "character letter" stating in effect that he believes Plaintiff to be an honest person.

Mr. Azhari had been informed by third persons that Plaintiff had been terminated for stealing an antique vase while at a company function in Louisiana, and that Plaintiff was drunk at the function. According to Mr. Azhari, if Defendant Rayburn said anything, he only confirmed the story which Mr. Azhari had already heard. Mr. Rayburn's alleged remark had nothing to do with Mr. Azhari's opinion of Plaintiff because he would not have hired Plaintiff based upon what others had told him.

Even if Defendant Rayburn make [sic] the statements which Plaintiff attributes to him, the statements were made to Ms. Azarpour, Mr. Phillips, Mr. Lamun, and Mr. Wolfe were true, and truth is an absolute defense to a claim of slander. *Melton v. City of Oklahoma City*, 928 F.2d 920, 929 (10th Cir. 1991); *M.F. Patterson Dental Supply*, 401 F.2d at 169-70; Okla. Stat. tit. 12, § 1444.1. The only reason

Plaintiff was terminated from Philip Morris was because of his dishonesty for stealing the bottle of wine and for his insubordination. Mr. Rayburn allegedly informed people, other than perhaps Mr. Azhari, only that Plaintiff was terminated for stealing a bottle of wine, which is true. Such statements cannot be defamatory as a matter of law.

An employer has a right to terminated [sic] its sales representative and to notify customers and prospective customers of the termination, identify the new sales representative, and tell customers the reason for the sales representative's termination, even though that reason may be injurious or damaging to the discharged sales representative, provided it is done without malice or evil intent to injure or damage the terminated employee and for the purpose of protecting or promoting the employer's business. *M.F. Patterson Dental Supply,* 401 F.2d at 170-71. Plaintiff fails to show that there was any malice on the part of Defendants Rayburn and Philip Morris. To the extent Mr. Rayburn even communicated with the named customers, he had the right to inform them of Plaintiff's termination and the reasons therefor. The court therefore finds that even if Defendant Rayburn made the statements attributed to him, the statements were privileged communications and cannot be defamatory as a matter of law.

With respect to the alleged publication of Plaintiff's termination and the reasons therefor by Philip Morris employees to other Philip Morris employees, such statements cannot be defamatory as a matter of law. It is well settled under Oklahoma law that statements by an employee of a company to another employer [sic] of the

same company are not considered defamatory and are not considered communications to third parties. *Magnolia Petroleum Co. v. Davidson*, 194 Okla. 115, 148 P.2d 468 (1944); *Messina v. Kroblin Transp. Systems, Inc.*, 903 F.2d 1306, 1309 (10th Cir. 1990); *M.F. Patterson Dental Supply Co.*, 401 F.2d at 171. Furthermore, Plaintiff produced no specific evidence concerning alleged communications between employees.

As for Plaintiff's claim that he was defamed because Philip Morris sent a letter to the OESC which stated the reasons for his termination, the communication is absolutely privileged and cannot be defamatory as a matter of law. Under Okla. Stat. tit. 12, § 1443.1. a privileged publication or communication is one made in any legislative, judicial, or other proceeding authorized by law. The communication sent by Philip Morris to the OESC in response to the OESC's request for information from the company after Plaintiff applied for unemployment benefits. The communication stated that Plaintiff had been terminated for dishonesty, which was true, and is a proceeding authorized by law.

In regard to the "compelled" statements Plaintiff alleges he made to unnamed "prospective employers", Plaintiff's claims of defamation must fail because he produced no evidence concerning these allegations. Also, Plaintiff cited no authority to support such a cause of action, and the court is aware of no Oklahoma authority supporting such a cause of action.

The court finds that Defendants are entitled to summary judgment on Plaintiff's claims for defamation. Even

if Defendant Rayburn make any of the statements attributed to him, those statements, other than the one perhaps allegedly made to Mr. Azhari, were true in that the reason for Plaintiff's termination from employment was his dishonesty for stealing the bottle of wine. In addition, the statements were privileged communications made to customers of Philip Morris and there was no malice on the part of Defendants Rayburn and Philip Morris. As for the statement Mr. Rayburn allegedly made to Mr. Azhari, that statement cannot be defamatory as a matter of law. Mr. Azhari's deposition testimony established that the alleged reason for Plaintiff's termination had already been communicated to him by third parties other than Mr. Rayburn. Plaintiff could not have been damaged by any statement allegedly made by Mr. Rayburn to Mr. Azhari because Mr. Azhari already believed that Plaintiff was a thief and had predetermined not to hire Plaintiff based upon what he had heard from third parties. The court finds that the communications Plaintiff alleges were made between employees of Philip morris [sic] are not defamatory as a matter of law. The court further finds that the letter sent to the OESC is not defamatory as a matter of law because it is absolutely privileged and was true. Further, the court finds that Plaintiff was not damaged in any way by the alleged defamatory statements because none of the identified "prospective employers" believed Plaintiff unfit for his business occupation. Therefore, Plaintiff's reputation was not harmed based on statements attributed to Defendant Rayburn.

Plaintiff's Claims for Negligent Retention/Respondeat Superior

Because the court finds that there is no wrongdoing by Defendant Rayburn in this case, Philip Morris and Philip Morris Management are entitled to summary judgment on Plaintiff's claim for negligent retention/respondeat superior. Philip Morris and Philip Morris Management cannot be liable for acts attributable to Defendant Rayburn if he was not guilty of any wrongdoing.

Plaintiff's Claims against Philip Morris Management

The court finds that Philip Morris Management is entitled to summary judgment on all of Plaintiff's claims. Plaintiff presented no evidence whatsoever that any employee of Philip Morris Management was involved in the decision to terminate Plaintiff's employment or in the post-termination conduct that Plaintiff alleges gives rise to several of his claims. Philip Morris Management and Philip Morris are separate companies. Plaintiff presented no evidence that the court should consider the actions of one to be the actions of the other. Because there is no evidence to link Philip Morris Management to Plaintiff's claims, the court finds that Philip Morris Management is not a proper party to this case and should be dismissed.

In sum, the court finds that Defendants are entitled to summary judgment on all of Plaintiff's state law claims. Plaintiff has failed to produce evidence sufficient to raise a genuine issue of material fact as to any of his claims. The court finds therefore that the evidence Plaintiff has presented to support his state law claims is so weak that a reasonable jury could not possibly find that

he is entitled to prevail on those claims. The court believes that Plaintiff should not have filed his state law claims because there is no basis in law or fact for those claims.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' motion for summary judgment on Plaintiff's state law claims is GRANTED. Accordingly, Plaintiff's state law claims are DISMISSED.

Dated this 10th day of December, 1992.

/s/ Luther Bohanon
United States District Judge

ENTERED IN JUDGMENT
DOCKET ON 12-10-92